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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

612

SHEILA JAMES DEL GUERCIO,

Petitioner,

against

EDMUND H. JAMES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner Sheila James Del Guercio prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on June 15th, 1967 which dismissed the petitioner's appeal as of right from a judgment of the Appellate Division, Second Department of the State of New York entered April 24th, 1967 which affirmed an Order of the Supreme Court of the State of New York, Westchester County entered on November 21st, 1966.

The Opinions of the Courts Below

The opinions of the Supreme Court, Westchester County rendered by Justice John J. Dillon are printed in the Appendix hereto (16, 21).*

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* References herein to the appendix in this Court are by page number. References herein to the Record on Appeal in the Courts below are by page number followed by the letter "a".

Jurisdiction

The order of the Court of Appeals of the State of New York sought to be reviewed was entered on June 15th, 1967, and served by mail on June 27, 1967 and is printed in the Appendix hereto (23).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Questions Presented

Whether the action of the New York Supreme Court, Westchester County, in attempting to enforce a prior custody decree of the Appellate Division, Second Department was an erroneous and unconstitutional assumption of jurisdiction and a deprivation of the petitioner's right to due process of law when subsequent to the custody decree and prior to the application for its enforcement, neither the natural parents who are the parties in this litigation, nor the child continued to be domiciled, resident or physically present in the State of New York.

Where the judgments of the Courts of New York represent a refusal to give full faith and credit to the orders of the State of South Carolina made August 12, August 25 and November 3, 1966, assuming jurisdiction over the child physically present in that State.

Where the action of the New York Courts in enforcing Section 240 of the Domestic Relations Law of the State of New York as a permanent reservation of jurisdiction has imposed upon the State of South Carolina and the petitioner here a compulsory permanent recognition of said prior judgment and decree contrary to the holdings of this Court, since South Carolina gives evidentiary recognition to prior decrees but decides each child custody case upon the welfare of the child then within its jurisdiction.

Statute Involved

The statutory provision involved is Section 240 of the Domestic Relations Law of the State of New York, which provides as follows:

"In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction may make provision for the education and maintenance of such child out of the property of either or both of its parents. Such direction may require the payment of a sum of sums or money either directly to the wife or to third persons for goods or services furnished for such child, or for both payments to the wife and to such third persons. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the wife under this section with any amount payable to the

wife under section two hundred thirty-six. Upon the application of either the husband or the wife, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party or parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment or annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this chapter the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."

Statement of the Case

The petitioner here, Sheila James Del Guercio, and the respondent, Edmund H. James, were formerly married to each other and resided in the State of New York. The petitioner went to Florida and filed a divorce action. The parties entered into a separation agreement in 1959 by the terms of which the father was to have the custody of their son, Edmund Christopher James subject to visitation rights of the mother and the father filed a notice of appearance. Subsequently, this agreement was confirmed by an Order of the New York Supreme Court, Westchester County on December 21, 1959. After the divorce both former spouses remarried and the petitioner moved to Landrum, South Carolina with her new husband. The respondent continued to reside in New York (23a).

On July 9, 1964 the Appellate Division, Second Department enlarged the petitioner's visitation rights, permitting her to have her son visit her in South Carolina for two months each summer (13a). During 1964, the petitioner complied with the decree of the Appellate Division and returned the boy to the domicile of his father which was in New York. However, in 1965, the respondent moved to Newark, New Jersey, relinquishing his domicile in New York. During the summer of 1965, the petitioner picked up her boy and returned him to the child's new home in New Jersey.

When the boy was picked up to spend the summer vacation of 1966 with his mother in South Carolina, it was immediately apparent to the petitioner that her child's physical and mental well-being had drastically changed since the decree of the New York Court two years previous.

The boy was now living in a drab, unseemly neighborhood in Newark and was exposed to an environment ill-suited for the healthy development of an adolescent youngster. His mother noted that he appeared thin and undernourished and was in need of immediate orthodontic work which was almost too late to commence. He did not appear to be well adjusted or accustomed to the regular routine of family life. The youngster spontaneously stated that he wanted to remain with his mother. Naturally, the petitioner, Mrs. Del Guercio, was concerned and upset believing he had not received adequate schooling, that his supervision and upbringing had been neglected, and that he had not had the proper opportunity for exercise and physical development. She believed his welfare demanded immediate legal action to rectify the deleterious situation to which the present custodial arrangement exposed the boy (33a). She thereupon consulted counsel in New York who advised her that New York no longer retained jurisdiction over the parties or the status of their rights with

respect to the custody of the child since neither party nor the child retained any nexus to the State of New York by way of domicile, residence, or physical presence which would justify a legitimate concern of the State of New York regarding the present custodial relationship (17a). Promptly thereafter, the petitioner, Mrs. Del Guercio obtained from the Court of Common Pleas of the State of South Carolina an Order and Rule to Show Cause why the former custody relationship should not be modified so that Mrs. Del Guercio would retain legal custody of her child in South Carolina (31a). The respondent appeared specially and subsequently the Court ruled it had jurisdiction to entertain Mrs. Del Guercio's application for modification of custody rights basing its power on the fact that the child was physically present in South Carolina and the inherent modifiability of a custody decree (46a). At present determination on the merits of the respective rights of the former spouses to the custody of the child is still pending in the South Carolina Courts. The child has been living with the mother and going to school there for more than a year.

After the South Carolina proceeding had been instituted, the respondent, Edmund H. James, obtained an Order to Show Cause from the Supreme Court of New York, Westchester County on September 6, 1966 by which he sought to enforce the prior decree of the Appellate Division, Second Department, dated July 9, 1964 and to have Mrs. Del Guercio found in contempt of that decree for her failure to return the child to New Jersey (8a). Mrs. Del Guercio appeared specially and contested the jurisdiction of the New York Supreme Court to entertain such a motion basing her objection on the ground that since the former spouses and the child were no longer domiciliaries, residents, or physically present in New York, any purported assumption of jurisdiction by the New York Court was erroneous and unconstitutional and in violation of the

petitioner's right to due process of law (16a, 19a, 28a, 33a). Nevertheless, her objections were overruled in an opinion rendered by Justice John J. Dillon of the Supreme Court, Westchester County, which held that under the theory of continuing jurisdiction, since the parties had once litigated their custodial rights in New York, even though they had moved from the State, the Courts of New York still retained jurisdiction to enforce a prior custody decree rendered there (24a).

From this decision and a resulting decision and order, (5a-8a; 16-20) the petitioner appealed to the Appellate Division, Second Department (3a). In that Court she disputed the lower Court's assumption of jurisdiction on the ground that the power which allows a State to interfere with the natural custodial rights of parents to their child is purely local in nature and whether the initial determination of such custody rights is involved or enforcement of a prior decree is sought, either the parties or the child must maintain the minimum jurisdictional connection of domicile, residence or physical presence with the State. Since none of these contacts were present here, she maintained that the anomaly was presented of the exercise of a purely local power of *parens patriae* in an extra-territorial fashion by the means of the erroneous application of the concept of continuing jurisdiction. She further argued that since South Carolina had already assumed jurisdiction and had a paramount interest and superior concern for the child's custody because he was physically present within that State, New York should have deferred to that superior jurisdiction and its failure to do so was a violation of due process.

By an order of the Appellate Division, Second Department, entered on April 24, 1967, the order of the Supreme Court, Westchester County, was affirmed without opinion (A true copy is printed in Appendix, p. 22).

Thereupon, the petitioner simultaneously moved for leave to appeal and appealed as a matter of right to the Court of Appeals of the State of New York. Her appeal as of right was based on the constitutional issue of whether New York erroneously assumed jurisdiction to enforce the prior custody decree. On June 15, 1967 the Court of Appeals denied her motion for leave to appeal and dismissed her appeal taken as of right stating in regard to the latter appeal that no substantial constitutional issues were involved (23). Implicit in this decision to dismiss was the determination by the Court of Appeals that New York did have jurisdiction to entertain the respondent's motion to enforce the prior custody decree and must be construed as affirming the validity of an assumption of jurisdiction which the petitioner maintains is constitutionally impermissible.

It is from this Order that the petitioner now seeks a writ of certiorari.

Reasons for Granting a Writ

The important constitutional issue presented by this petition for a writ of certiorari is whether a State in which a custody decree has been rendered retains jurisdiction to enforce such a decree when subsequently both the parents and the child are no longer domiciled, resident or physically present in the State.

Traditionally, the contacts with a State to allow it to exercise its power of *parens patriae*—the power of a sovereign as supreme parent of the children within its territory to act in their best interests regarding their health, welfare, and custody—have been based on the categories of either 1) domicile; 2) residence; or 3) physical presence. (*Sampsell* v. *Superior Court*, 32 Cal. 2d 763, 197 P. 2d 739.) That at least one of those contacts is necessary to proper assumption of jurisdiction by a sovereign is evident from an understanding of the power which a State invokes to modify

or enforce custody rights. It is purely a local power, co-extensive with the territorial limits of the State and applicable only to those persons or the status of those persons who maintain one of the three contacts with the State listed above.

When the parties have left the State, and have acquired new domiciles elsewhere, even though a prior custody decree was validly rendered at one time, it is error for the State to attempt to enforce the decree when the only contact the parties may presently be said to have with that State is the mere historic fact that custody litigation once took place there. Certainly such a historic connection falls below the minimal jurisdictional standards prescribed by due process of law. *International Shoe Co.* v. *State of Washington*, 326 U. S. 310, 319, 66 S. Ct. 154, 159, 90 L. Ed. 95.

The distinction between the indigenous use and exercise of the power of *parens patriae* and any extra-territorial attempt to assert such power is critical. There cannot be in reference to this power any interstate aspect that would allow one State to adjudicate or order the continuance of custodial rights among parties who are not domiciled or resident in that State. Otherwise the anomaly would be present of a covereign exercising its parental function over children in nowise connected with it.

Such a situation is presented here, however, by the dismissal of the petitioner's appeal as of right. The Court of Appeals of the State of New York has failed to entertain a vital and substantial constitutional issue and has implicitly sanctioned the erroneous decision of Mr. Justice Dillon in the Supreme Court, Westchester County, that the concept of continuing jurisdiction can extend a strictly local power to reach parties no longer connected with the State of New York. Whatever validity the theory of continuing jurisdiction may have in other areas of the law, it is inapplicable

to the area of child custody and the special power the sovereign possesses in regard to the child's best interest. As Mr. Justice Frankfurter wrote in his concurring opinion in *May* v. *Anderson,* 345 U. S. 528, 73 S. Ct. 840, 97 L. Ed. 1221:

> ". . . Property, personal claims, and even the marriage status . . . generally give rise to interests different from those relevant to the discharge of a State's continuing responsibility to children within her borders. Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children . . ."

It was precisely the uncritical application of the theory of continuing jurisdiction which caused the Supreme Court, Westchester County to erroneously and unconstitutionally purport to assume jurisdiction in this case.

Even assuming a technical continuing jurisdiction remained in the Courts of New York, that residuum of jurisdiction was so tenuous and unsubstantial that the minimum requirements of due process could not be met. It is obvious that the New York forum was not only inconvenient but manifestly inappropriate to further adjudicate or enforce custody rights in a situation in which it had no legitimate concern.

The petitioner here brought her custody proceeding in the only State which had a legitimate concern, the State of South Carolina. As Mr. Justice Frankfurter noted in his concurring opinion in *May* v. *Anderson, supra*:

> "But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."

With the child physically present in South Carolina, the Courts of that State had the duty and the paramount interest in deciding into whose custody the best welfare of the child would reside. Instead of deferring to such paramount jurisdiction, the New York Court has erroneously assumed jurisdiction prohibited by the Constitution.

This Court in *Kovacs, Petitioner* v. *George A. Brewer, Sr.*, 356 U. S. 604, held that a North Carolina court was not bound by a modification decree of a New York State court which had granted a divorce decree and which had modified the decree on the basis of its statutory continuing jurisdiction in the divorce action. The North Carolina court had held that that State, where the child had been, had jurisdiction to determine the welfare of the child even though the original New York divorce decree contemplated the removal of the child to North Carolina by the grandfather. The North Carolina Supreme Court held alternatively that the courts of North Carolina like the courts in New York are not bound by a prior custody order where changed circumstances called for a different arrangement to protect the child's health and welfare and alternatively that the New York modification decree was not binding in any event because New York had no jurisdiction to act with respect to custody after the child had become a resident and domiciliary of North Carolina. In its opinion, the United States Supreme Court remanded the case to North Carolina to determine the issue of changed circumstances and left that determination to the North Carolina courts whose policy was to protect the child's health and welfare. It found unnecessary the determination whether New York had completely lost jurisdiction. Mr. Justice Frankfurter dissented because he felt that there could be some implication drawn from the court's refusal to deal with the issue of whether New York had completely lost jurisdiction. He re-states again his belief that the court where the child is present is the only one which has jurisdiction, relying in

a large part upon many of the New York cases. A pertinent portion of his opinion begins at 356 U. S. 611:

> "It was the purpose of the Full Faith and Credit Clause to preclude dissatisfied litigants from taking advantage of the federal character of the Nation by relitigating in one State issues that had been duty decided in another. The clause was thus designed to promote a major policy of the law: that there be certainty and finality and an end to harassing litigation. But when courts are confronted with the responsibility of determining the proper custody of children a more important consideration asserts itself to which regard for curbing litigious strife is subordinated—namely, the welfare of the child. That, in the familiar phrase used by the Supreme Court of North Carolina in this case, 'is the polar star by which the courts must be guided in awarding custody.' 245 NC, at 635, 97 SE 2d, at 100, 101. When the care and protection of the minors within their borders falls to States they must be free to do 'what is best for the interest of the child.' *Finlay* v. *Finlay,* 240 NY 429, 433, 148 NE 624, 626, 40 ALR 937 (1925) (per Cardozo, J.); see *Queen* v. *Gyngall* (Eng) (1893) 2 QB 232, 241 ('The Court is placed in a position * * * to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child').
>
> Because the child's welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory nature. The passage of even a relatively short period of time may work great changes, although difficult of ascertainment, in the needs of a developing child. Subtle, almost imperceptible, changes in the fitness and adaptability of custodians to provide for such needs may develop with corresponding rapidity. A court that is called upon to determine to whom and under what circumstances

custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court, irrespective of whether 'changes in circumstances' are objectively provable. To say this is not to say that a court should pay no attention to a prior decree or to the status quo established by it. These are, of course, among the relevant and even important circumstances that a court should consider when exercising a judgment on what the welfare of a child before it requires. See *People ex rel. Allen* v. *Allen,* 105 NY 628, 11 NE 143, 144 (1887) (Illinois custody decree was 'a fact or circumstance bearing upon the discretion to be exercised without dictating or controlling it').

In short, both the underlying purpose of the Full Faith and Credit Clause and the nature of the decrees militate strongly against a constitutionally enforced requirement of respect to foreign custody decrees. New York itself, the State for whose decree full faith and credit is here demanded, has rejected the applicability of that requirement to custody decrees. See, e.g., *Bachman* v. *Nejias,* 1 NY 2d 575, 580, 154 NY 2d 903, 136 NE 2d 866, 868 (1956) ('The full faith and credit clause does not apply to custody decrees'); *People ex rel. Herzog* v. *Morgan,* 287 NY 317, 320, 39 NE 2d 255, 256 (1942); *People ex rel. Allen* v. *Allen,* 105 NY 628, 11 NE 2d 143, supra; *Hicks* v. *Bridges,* 2 App. Div. 2d 335, 339, 155 NYS 2d 746, 751 (1956); *People ex rel. Kniffin* v. *Knight,* 184 Misc. 545, 550, 56 NYS 2d 108, 113 (1945). And writers on the subject have observed a marked tendency among other state courts to arrive at this same conclusion, although often spelling out their judgments in traditional terms. See *Ehrenzweig, Interstate Recognition of Custody Decrees,* 51 Mich. L. Rev. 345; *Stansbury, supra.* • • • The minimum nexus between court and child that must exist before the court's award of the child's custody

should carry any authority is that the court should have been in a position adequately to inform itself regarding the needs and desires of the child, of what is in the child's best interests. And the very least that should be expected in order that the investigation be responsibly thorough and enlightening is that the child be physically within the jurisdiction of the court and so available as a source for arriving at Solomon's judgment. See *Stumberg, The Status of Children in the Conflict of Laws,* 8 U. of Chi. L. Rev. 42, 56, 58, 62. To dispense with this requirement is seriously to undermine the conscientious efforts that most state courts expend to carry out their functions in child custody cases in a responsible way."

Thus, it is plain from a consideration of the local nature of the power of *parens patriae,* its inappropriateness to be extended extra-territorially through the technical theory of continuing jurisdiction, and the lack of any substantial basis of jurisdiction of the New York court that the New York court had no jurisdiction to entertain the application of the respondent, that its attempt to do so was unconstitutional, and that its decree was null and void.

The Question is of General Importance

The petitioner requests this Court to entertain her petition because the area of custody law is especially in need of a definitive and authoritative decision to clarify the confusion that has become a phenomenon of this type of litigation, particularly, to state clearly the requisite jurisdictional basis and contacts that must exist with a State before it can validly assume jurisdiction to adjudicate or enforce custodial status.

With the ever increasing divorce rate and a commensurate growth in custody litigation compounded by the

mobility of the American public and concomitant multi-state contacts, unless clear guidelines are defined by this Court, custodial litigation will continue to be plagued by the potential of conflicting decrees with all the attendant legal, not to mention emotional chaos and confusion.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN C. MARBACH,
Counsel for Petitioner.

THOMAS E. O'NEILL,
Of Counsel.

APPENDIX

Opinion of Mr. Justice John J. Dillon, dated September 29, 1966.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

IN THE MATTER OF THE APPLICATION OF
EDMUND H. JAMES,

Petitioner-Respondent,

for an Order with respect to the custody, control and welfare of EDMUND CHRISTOPHER JAMES, an infant now held by SHEILA JAMES DEL GUERCIO,

Respondent-Appellant.

DILLON, J.:

This application is the latest development in a long history of matrimonial and custody litigation which has been in progress since 1957. The petitioner and the respondent were formerly husband and wife, and have one child, an 11-year old boy. After considerable litigation in New York, where the parties then resided, they were divorced in Florida in 1959. At that time they entered into an agreement whereby custody of the child was vested in the father, with the mother retaining the right of visitation on alternate week-ends and for two consecutive months each summer, but only within the State of New York. This agreement was approved in a final order entered in a habeas corpus proceeding in this court on December 21, 1959. The mother's visitation rights were to be exercised only within this State.

Opinion of Mr. Justice John J. Dillon, dated September 29, 1966.

In the early part of 1963 the mother commenced an equity proceeding to alter the provisions of the agreement and order so as to permit her to have the child visit her at her home in South Carolina. By this time both parents had remarried. The mother lived with her new husband on a large estate in Landrum, South Carolina. The father and child lived in New York City. After a hearing this court denied the application for the reasons stated in a decision dated May 2, 1963. On appeal the Appellate Division modified (and in effect reversed) the Special Term order by permitting the mother "to take the child to the State of South Carolina for two consecutive months during the summer of each year commencing 1964, on condition that she shall first file and serve an undertaking for $25,000., with corporate surety, to guaranty the child's prompt return to respondent in New York at the end of each such two month period". (*Matter of Del Guercio* v. *James,* 21 App. Div. 890). Apparently this worked well enough for two years. In the present year the mother had the child at her South Carolina home for July and August, at the end of which time she refused to return him to the father. It would seem that she is willing to forfeit the bond to achieve her objective. She has now commenced a proceeding in the courts of South Carolina to obtain permanent custody of the child.

The father makes application to this court for an order (1) directing the return of the child, (2) holding the mother in contempt of the order of the Appellate Division, and (3) declaring a forfeiture of the bond. The respondent has appeared specially and challenged the jurisdiction of the court. At some time since the termination of the proceeding commenced in 1963 the father changed his residence to the State of New Jersey. The mother resides in South Carolina. The child is now physically in South

Carolina, though his residence is probably in New Jersey where he ought to be living with his father. The motion to dismiss is based upon the fact that none of the parties are domiciled in New York and that the child is not now within the State.

It cannot be doubted that the New York courts had jurisdiction of the parties and of the subject-matter of the proceeding which resulted in the Appellate Division order of July 9, 1964. Although the child's mother was then, as she is now, a resident of South Carolina, she invoked the jurisdiction of New York to her own advantage. It was the order in that proceeding which enabled her to take the child lawfully into the state of her own residence. The jurisdiction then acquired by New York is a continuing one. At least since 1925 the courts of this State have retained jurisdiction in matrimonial actions after the entry of final judgment, by virtue of section 1170 of the Civil Practice Act and more recently under section 240 of the Domestic Relations Law. In *Fox* v. *Fox*, 263 N. Y. 68, the court said

> "The effect of the statute is to write a reservation into every judgment of divorce. The jurisdiction of the court over the parties and over the incidental subject-matter is prolonged; and to that extent the matter may be said to be pending within the meaning and intent of section 1169 of the Civil Practice Act."

Many other authorities to the same effect are collected in *Church* v. *Church*, 23 Misc. 2d 189. There, as in the present case, the parents and the children were all non-residents of the State. Nevertheless the court overruled an objection to the court's jurisdiction and entertained an application to modify a judgment of separation with respect to custory. It did so on the basis of section 1170 of the Civil Practice Act, as construed in the *Fox* case.

It is important to note that when section 1170 of the

Opinion of Mr. Justice John J. Dillon, dated September 29, 1966.

Civil Practice Act was incorporated into section 240 of the Domestic Relations Law, its provisions were enlarged beyond matrimonial actions. The continuance of the court's jurisdiction after final judgment now applies equally to "any action or proceeding brought * * * (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage." Consequently, what was said in the *Fox* case about the continuance of jurisdiction in a divorce action is now equally applicable to the kind of proceeding instituted by this child's mother in New York in 1963. Section 240 of the Domestic Relations Law was in effect before the entry of the Appellate Division's order of July 9, 1964.

This is not to say that the present application could be entertained without notice to the mother. What section 240 requires is "such notice to the other party * * * as the court shall direct." Here the court directed, in the order to show cause, that service be made upon an agent appointed by the mother for that purpose in the separation agreement of December 9, 1959. That agreement is still in effect except as modified by the Appellate Division. The effectiveness of the notice is established by the fact that the mother appeared by counsel on the return day. The mother therefore had adequate notice; but the point is that this is not regarded by the court as a new and independent proceeding, but merely as a motion in the same proceeding as that instituted by the mother in 1963. The New York court has never lost jurisdiction of the parties to that proceeding or of its subject-matter, which was the custody of the child. Any other conclusion would make a mockery of the court's authority. This court is unwilling to say that our judicial system is helpless to meet the situation described in the moving papers, and

that it must tell the father to accept the proceeds of a bond as a substitute for his child.

The court overrules the objection to the court's jurisdiction as to the first two forms of relief sought by the moving party. As to the third item—the forfeiture of the bond—the objection is sustained and in that respect the petition is dismissed. The surety on the bond has not been made a party to the proceeding, the court does not know the condition of the bond, and the moving party has not pursued the proper remedy on this phase of the matter.

The respondent may still wish to oppose the application on the merits; and if she is so advised she may interpose a supplemental affidavit within eight days after the date of this decision, in which event the court will make a supplemental ruling. If such affidavit is not made available to the court within the time specified, an order may be submitted on notice granting the first two forms of relief specified in the order to show cause and denying the third.

Dated: White Plains, New York
September 29, 1966

/s/ JOHN J. DILLON,
J. S. C.

Milton Gurwitz, Esq.
Attorney for Petitioner

Bleakley, Platt, Schmidt, Hart & Fritz, Esqs.
Attorneys appearing specially for Respondent

Opinion by Mr. Justice John J. Dillon, dated November 4, 1966.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE]

DILLON, J.:

The court rendered a decision in this proceeding on September 29, 1966, in which it overruled the objection to the jurisdiction of the Court to grant petitioner custody of the child and to hold the respondent in contempt of court. The respondent was afforded an opportunity to oppose the petition on the merits, and affidavits and a legal memorandum have been submitted on her behalf. There are no facts set forth in the affidavit to justify the respondent's failure to return the child to his father in accordance with the order entered on the decision of the Appellate Division (*Matter of Del Guercio* v. *James*, 21 A. D. 2d 890).

Accordingly, the respondent is adjudged to be in contempt of court and will be permitted to purge herself of such contempt by forthwith returning the child to his father.

Submit order on notice.

Dated: White Plains, New York
November 4, 1966

/s/ JOHN J. DILLON,
J. S. C.

Milton Gurwitz, Esq.
Attorney for Petitioner

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Attorneys for Respondent

Order of Affirmance of the Appellate Division—Second Department.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 24, 1967.

HON. HENRY L. UGHETTA,
Acting Presiding Justice.
HON. ARTHUR D. BRENNAN,
HON. SAMUEL RABIN,
HON. A. DAVID BENJAMIN,
HON. FRED J. MUNDER,
Associate Justices.

IN THE MATTER OF
EDMUND H. JAMES,
Petitioner-Respondent,
v.
SHEILA JAMES DEL GUERCIO,
Appellant.

In the above entitled cause, the above named Sheila James Del Guercio, a party, having appealed to this court from portions of an order of the Supreme Court, Westchester County, dated November 18, 1966; and the said appeal having been argued by John C. Marbach, Esq., of counsel for the appellant, and by Milton Gurwitz, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order insofar as appealed from is hereby unanimously affirmed, with $10 costs and disbursements.

Enter:

HERMAN M. POGUL,
Clerk of the Appellate Division.

Order of Court of Appeals.

STATE OF NEW YORK,
IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fifteenth day of June A. D. 1967.

Present, HON. STANLEY H. FULD,
Chief Judge, presiding.

---

2 Mo. No. 622

IN THE MATTER OF
the application of EDMUND H. JAMES,
Respondent,
for an Order with respect to the custody &c. of EDMUND CHRISTOPHER JAMES, an infant now held by SHEILA JAMES DEL GUERCIO,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied, and it is

FURTHER ORDERED, on the Court's own motion, that the appeal taken as of right be and the same hereby is dismissed upon the ground that no substantial constitutional question is presented.

[SEAL]

A copy

GEARON KIMBALL,
Deputy Clerk.

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OCT 12 1967
JOHN F. DAVIS, CLERK

No. 612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

SHEILA JAMES DEL GUERCIO,

Petitioner,

against

EDMUND H. JAMES,

Respondent.

BRIEF OF RESPONDENT, EDMUND H. JAMES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

Supreme Court of the United States

OCTOBER TERM, 1967

Sheila James del Guercio,

Petitioner,

against

Edmund H. James,

Respondent.

BRIEF OF RESPONDENT, EDMUND H. JAMES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

The opinions of the Supreme Court of the State of New York, County of Westchester, rendered by Mr. Justice John J. Dillon, are printed in the Appendix hereto (16 and 21).*

Jurisdiction

The order of the Court of Appeals of the State of New York sought to be reviewed was entered on June 15, 1967; it was served by mail on June 27, 1967, and is printed in the Appendix hereto (23).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

References herein to the appendix in this Court are by page number. References herein to the Record on Appeal in the Courts below are by page number followed by the letter "a".

Questions Presented

Whether the courts of the State of New York may properly exercise jurisdiction over the petitioner and the infant child of the above parties where the petitioner had, pursuant to a matrimonial agreement, bound herself to submit to the jurisdiction of New York State courts, and where she had also previously, in the proceeding appealed from, without any reservation or special appearance, engaged in litigation on the merits before the courts of said State, concerning the custody of said child.

Whether the courts of the State of South Carolina must give full faith and credit to the prior orders of the courts of the State of New York.

Whether an illegal act, to wit, the withholding of said infant child by the petitioner from the respondent, in violation of a concededly valid court order, can result in conferring jurisdiction upon the courts of the State of South Carolina and, contrariwise, in ousting the New York State courts from exercising jurisdiction to implement its orders.

Statute Involved

The statutory provision involved is Section 240 of the Domestic Relations Law of the State of New York, which reads as follows:

> "In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of

the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction may make provision for the education and maintenance of such child out of the property of either or both of its parents. Such direction may require the payment of a sum or sums of money either directly to the wife or to third persons for goods or services furnished for such child, or for both payments to the wife and to such third persons. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the wife under this section with any amount payable to the wife under section two hundred and thirty-six. Upon the application of either the husband or the wife, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party or parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this chapter the authority

granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."

Statement

The parties hereto were married in the State of New York and resided there for a number of years until there was a separation and the petitioner transferred her residence to Florida, where she instituted a divorce action. In 1959 a separation agreement was executed between said parties, whereby said petitioner-mother voluntarily surrendered all of her rights to the custody of the infant child of the parties herein except for minimal visitation rights to be exercised only in New York. The child was then four years old. Thereafter, she secured a divorce with the cooperation of the respondent.

After said divorce said parties remarried, and the petitioner moved to South Carolina with her new husband. The respondent continued to reside in the State of New York for a while but thereafter moved (along with said child) to New Jersey, where they presently reside.

The petitioner, despite her residence in the State of South Carolina, nevertheless, in 1963, made application to the courts of the State of New York to modify said agreement and custody decree, and to increase her visitation rights. Upon said application being heard, the Appellate Division thereupon did modify the decree insofar as the child was concerned, to the extent of granting the mother visitation rights for summer vacations, to wit, July and August of every year, but upon the condition that she would purchase and file a surety company bond in the amount of $25,000 to insure the return of the child to the father.

The petitioner, being quite content with the order of said Court in the State of New York, thereupon did obtain such a bond and furnished same for the benefit of the respondent.

Thereafter, for two summers, said petitioner obtained temporary custody of said child and, at the conclusion of said periods, returned him to his father. In August, 1966, the petitioner decided that she would not return the child; and moreover, she proceeded to institute litigation in South Carolina to overcome not only the aforementioned matrimonial agreement, insofar as it concerned the custody of the child, but also with respect to the orders of the courts of the State of New York.

Upon being so apprised said respondent instituted a proceeding in the Supreme Court of the State of New York, County of Westchester, directed towards compelling said petitioner to return the child to the custody of the respondent, to hold her in contempt of court and also to declare the aforementioned surety company bond forfeited. This motion of the respondent was granted (20), insofar as the first two items of relief were concerned; the third was denied because the surety company had not been served with process. Said decision permitted the petitioner to contest the application on the merits and the opportunity so afforded was accepted. But after a review of the affidavits the lower court adhered to its prior decision (21). The petitioner appealed said decision to the Appellate Division of the Supreme Court of the State of New York, Second Department, which nevertheless unanimously affirmed the decision of the lower court (22).

The petitioner then made application to the Court of Appeals of the State of New York for leave to appeal to that Court, but the application was denied (23).

The petition contains unfair, undocumented and unfounded statements (at p. 5) as to the child's home with

the respondent—but there is absolutely nothing in the records of the foregoing proceedings in the courts below to support said statements, and they have been improperly included to color the petition herein and to influence this Court. In other words there is no evidence whatsoever to support any claim of "changed circumstances", and this is a *sine qua non* in a change of custody action.

Bluntly speaking, this petitioner, as aforestated, waived any right which she might have to the custody of her son in order to obtain the acquiescence and cooperation of the respondent to her obtaining a divorce so that she could be free to marry a very wealthy man, her present second husband (23a). Nonetheless, one may derive a realistic appraisal of the petitioner's character from such a callous surrender of her child, and the subsequent flouting of a court order demanding that she return the child.

During the custodial periods she has undoubtedly surrounded the child with unaccustomed luxuries which, of course, might sway a child twelve years old; but material comforts have been time and again held not a criterion whereby a court should determine custody rights.

Argument

I

The petitioner has contractually submitted herself to the jurisdiction of the courts of New York State by virtue of the matrimonial agreement entered into between the parties (19). It has been held that one or more contracting parties may bind themselves to submit to the jurisdiction of a particular state. *Esperti* v. *Cardinale Trucking Corp.*, 263 A. D. 46, 47. This factor alone distinguishes the facts at bar from all others cited by the petitioner, and surely should estop her from claiming a lack of due process.

Moreover, prior to the instant proceeding, this petitioner had participated in other similar litigation in the State of

New York in 1963 without any special appearance or the uttering of any complaint about the exercise of jurisdiction by said courts (17).

It is of sufficient importance to be determinative of this application, that the petitioner interposed objections on the merits, and without a special appearance, when suggested by a court below (27a), thus unequivocally recognizing and accepting the right of the court to adjudicate upon the issues herein.

As was stated by Mr. Justice Dillon, with keen perception (18):

> "Although the child's mother was then, as she is now, a resident of South Carolina, she invoked the jurisdiction of New York to her own advantage. It was the order in that proceeding which enabled her to take the child lawfully into the state of her own residence. The jurisdiction then acquired by New York is a continuing one.
>
> ". . . Here the court directed, in the order to show cause, that service be made upon an agent appointed by the mother for that purpose in the separation agreement of December 9, 1959. . . . The effectiveness of the notice is established by the fact that the mother appeared by counsel on the return day. The mother therefore had adequate notice; but the point is that this is not regarded by the court as a new and independent proceeding, but merely as a motion in the same proceeding as that instituted by the mother in 1963. The New York court has never lost jurisdiction of the parties to that proceeding or of its subject-matter, which was the custody of the child. Any other conclusion would make a mockery of the court's authority."

There is sound authority supporting the retention of jurisdiction by the New York courts. *Church* v. *Church*,

23 Misc. 2d 189; *In re Kades*, 23 Misc. 2d 222; *People ex rel. Ludden* v. *Winston*, 34 Misc. 21, aff'd 61 A. D. 614.

What right has South Carolina to assume that New York will rule adversely to the best emotional and physical interests of the child? Why should this ultimate tribunal conclude that South Carolina, merely by virtue of the accidental and illegal presence of the child in that jurisdiction, will render a decision which will be compatible with the best interests of the child?

Assuming, *arguendo*, that New York has the paramount claim to jurisdiction, the possibility of a provincial approach by South Carolina has drawn adverse comment. Foster-Freed, "The Law and the Family," Vol. 2, page 562, cogently declares:

> "The sad fact is that far too many modification cases clearly indicate a prejudice for the local citizen and hostility against a party from another state and the courts in their anxiety to safeguard what they regard as the proprietary interest in the child have done great damage to his real best interests."

This Court ought not, it is respectfully urged, overlook the fact that it ill-becomes the petitioner to belatedly express her alleged motherly concern for this child when she had, for selfish reasons, waived any right to his custody when she entered into the matrimonial agreement in 1959 (16).

The petitioner pointedly neglected to include the report of her alleged investigators in the papers filed in the lower court (36a). Thus, all that is presented to this Court is a bare, *ex parte*, conclusory and self-serving statement that the environment at the father's home is unsatisfactory, but not one shred of supporting evidence.

As aforestated, further justification for New York to retain jurisdiction may be obtained from the fact that the

petitioner, as aforementioned, was obligated by court order and did, thereafter, file a surety company bond to assure the return of said child. This may be deemed tantamount to the petitioner having property within New York not only to indemnify the respondent for any financial loss but also to guarantee that she would be at all times amenable to the jurisdiction of the courts of New York.

The fact that the petitioner considered New York as being the proper forum may be judged from her resort to this State in 1963, when she desired a modification of the custody provisions (33a and 52a).

And it may be readily assumed that had the respondent deliberately refrained from turning over the child to the petitioner for the summer months of 1966, she would not have appealed for relief to the courts of either South Carolina or New Jersey, but rather New York; for South Carolina would have refused to rule on the problem, since neither the respondent or the child were there, and New Jersey could have refused by declaring that there was no local court order before it which could be found to have been violated.

Due process of law has been extended to the petitioner and the foregoing provides sound reasons and every justification for South Carolina to extend full faith and credit to the orders of the New York State courts.

Some reliance is placed by the petitioner upon *May* v. *Anderson,* 345 U. S. 528, 73 S. Ct. 840, 97 L. Ed. 1221. However, there are vital distinguishing facts between that case and the one at bar. There the mother did not participate in the proceedings in Wisconsin, where the father had obtained an *ex parte* divorce decree, which also awarded him the custody of the children. It was there held that there was no compliance with due process of law because the very service of process of the Wisconsin court was deemed invalid since it concerned the custody of children (although it was adequate insofar as obtaining jurisdiction for the purpose of securing a divorce).

Thus, this court held that no *in personam* jurisdiction was obtained. But, contrariwise, in the instant case there is *in personam* jurisdiction, since the petitioner duly appointed an attorney as her agent to receive process on her behalf (11a). *Esperti* v. *Cardinale Trucking Corp.*, 263 A. D. 46, 47 (*supra*, p. 6). It cannot be emphasized too strongly that never at any time in the course of the litigation in the courts below has the petitioner ever denied either said appointment or its validity and binding effect upon her (26a). In the facts at bar the withholding of the child after the custodial period had expired was tantamount to an abduction.

It is respectfully urged that the dissenting opinion of Mr. Justice Jackson in *May* v. *Anderson* is more persuasive and applicable to the facts at bar.

And again we find distinguishing features in *Kovacs* v. *Brewer*, 365 U. S. 604, 2 L. ed. 2d 1008, 78 S. Ct. 963, which coincidentally concerned a New York custody decree, the action was retorned to the North Carolina, courts for "clarification" in order "to determine the issue of changed circumstances" (p. 608). At bar no evidence at all was presented, in fact no hearing was held in South Carolina as to this problem. Accordingly since the last formal determination as to the custodial problem was made in New York, with both parents before the court, that decree must be fully recognized in South Carolina.

Parenthetically it may be noted that the mother in the *Kovacs* action moved with something less than alacrity to secure possession of her child (p. 605), i.e., 14 months after the custody award, and somewhat similarly in the instant action, the mother exhibited lack of parental zeal for her child when she sought to be relieved of the need to accept the child for the month of July, 1966 (44a).

II

The petitioner has committed a calculated, illegal act in withholding the child and, accordingly, should be deemed to have forfeited any sympathy or consideration by this Court. She was declared to have committed a contempt of Court (52a). Any semblance of approval for such improper action by the petitioner would encourage others to emulate her—to "take the law" in their hands. Moreover it was well phrased in *Lang* v. *Lang,* 9 A. D. 2d 401, 405 (aff'd 7 N. Y. 2d 1029), when the court said:

> ". . . a contemptuous wrongdoer should have no standing to obtain relief in a court."

It is also of interest that said opinion also declared that the mere fact that one parent has achieved an economic improvement does not warrant a transfer of the custody of a child to that parent.

A decision favorable to this petitioner would be a reward to a litigant who comes into court with unclean hands, having committed a lawless act. See Ratner, Child Custody in a Federal System, 62 Mich. Law Rev. 795 (1964). One can conjecture that should the petitioner gain the approval of this Court to her high handed action, and thus have the right to retain the child, thereafter this respondent would resent such a judicial reaction with the perhaps understandable layman's reaction to imitate the petitioner's wrongful tactics. The inevitable result could readily be armed guards on both sides, a series of unending applications to courts, forum shopping, revolving door litigation, a child buffeted between opposing parents and living in armed camps—a shocking prospect. Where would it end?

Mr. Justice Rutledge commented on this struggle in *Halvey* v. *Halvey,* 330 U. S. 610, 619-620, 67 S. Ct. 903, 91 L. Ed. 1133, 1138-1139.

> "The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence hardly can be thought conducive to the child's welfare . . . The effect of the decision may be to set up an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters."

A definitive ruling against a court—defying parent would have a salutary effect.

CONCLUSION

The petition for a writ of certiorari herein should be denied, with costs.

Respectfully submitted,

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October, 1967